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Supreme Court of The United States

OCTOBER TERM, 1968

NO. 318

VANCE TRUCKING COMPANY, INC., and
ALLSTATE INSURANCE COMPANY,

Petitioners,

versus

CANAL INSURANCE COMPANY, FORRESTER TRUCKING COMPANY, INC., HERBERT FRANCIS CARSON, SCOTT CARSON, SUSAN CARSON, DAVID CARSON, CHRISTOPHER CARSON, and ROBERT H. CARSON, Administrator of the Estate of Annie Barbara Carson, Deceased,

Respondents.

BRIEF OF RESPONDENTS CANAL INSURANCE COMPANY AND FORRESTER TRUCKING COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The orders of the District Court dated January 6, 1966 and March 9, 1966 are reported at 249 F. Supp. 33 and 251 F. Supp. 93. The decision of the Fourth Circuit Court of Appeals, dated May 7, 1968, and the denial of a re-hearing by that Court, dated June 20, 1968, are not yet reported. The decisions by the Fourth Circuit, respectively, are printed at pages 24 and 42 of the petitioners' appendix.

QUESTIONS PRESENTED

I

Is the decision of the Fourth Circuit Court of Appeals, requiring proration of insurance between Allstate and Canal, in conflict with the law of the State of South Carolina?

II

Does the decision of the Fourth Circuit Court of Appeals amount to an impairment of the obligations of a contract between Allstate and its insured and, if so, is such prohibited by the Constitution of the State of South Carolina?

STATEMENT OF CASE

Respondents adopt the statement of the case set forth by petitioners to the extent that it represents a statement of the proceedings here but not to the extent that it sets forth petitioners' arguments and implications. Furthermore, respondents object to the implication by the petitioners that multiple claims are now in litigation. Only one suit has been filed.

ARGUMENT

I

Respondents oppose the petition for certiorari because, taken as a whole, it represents no more than an attempt by petitioners to have yet another review of the merits of this controversy.

Petitioners have been resourceful in the continuing presentation of legal theories. We say "continuing" because at each stage of the trial and appellate procedures petitioners have seemingly adopted at least one new theory to demonstrate the error of a prior determination. Examples of this are most easily recognized in their use of newly decided cases. When before the Fourth Circuit Court of Appeals for review, petitioners presented, for the first time, their argument that co-insurance of the same risk is prerequisite to contribution among insurers in South Carolina, citing *Galloway v. Southern Farm Bureau*

Insurance Company.[1] After an adverse determination by the Fourth Circuit on May 7, 1968, petitioners, in seeking a rehearing before that Court, urged another new theory, that enforcement of the Court's decision would amount to a prohibited impairment of a contract, in derogation of the Constitution of the State of South Carolina, Article I, Section 8, citing *Travelers Insurance Company v. Allstate Insurance Company.*[2]

Petitioners sedulously foster myopic legal theories, caused solely by their failure to consider with equal diligence the merits of the reverse side of the coin, moreover, to recognize even that there may be another side.

In the course of its opinion, the District Court reviewed an impressive body of jurisprudence dealing with multiple insurance coverages and conflicting insurance clauses,[3] and arrived at the conclusion that there were "two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication."[4] Based on that situation, the court held that since Vance and Forrester, the two trucking companies, were concurrently liable, each should respond in proportion to its coverage.

The basis of petitioners' continuous complaint, however, is couched in the determination by the District Court that the driver of the tractor-trailer unit involved in the accident (which, though owned by Forrester Trucking Company, was under lease to Vance Trucking Company) was not insured under the policy of either Allstate or Canal. Common logic demands recognition that such a result was not intended by either insurance company. Each intended to furnish coverage to the driver up to the time when he became covered by another policy. It was never envisioned, nor intended, that the driver, obviously about someone's business, would be left completely uninsured.

The determination by the District Court is only unique

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[1] 247 S.C. 288, 147 S.E.2d 271 (1966).
[2] 249 S.C. 592, 155 S.E.2d 591 (1967).
[3] *Vance Trucking Co. v. Canal Ins. Co.*, 251 F. Supp. 93, 96-98 (D. S.C. 1966), set out on pages 28-31 of Petitioners' appendix.
[4] *Id.* at 98.

in its holding that, in an operation replete with coverage, the driver, the one involved in the accident, had none. The incongruity of the situation is seen in the fact that if the driver had been hauling for either of the trucking companies solely and had no connection with the other he would have had coverage, yet, because he was working for both at the same time, he was uninsured.

The resolution of the dilemma posed by the paradox of no coverage was the District Court's determination that the two insurance companies would have to pro-rate any loss in direct proportion to their respective coverages. This determination was reached only after a review of massive jurisprudence dealing with like situations.

Even a cursory review of the District Court's opinion will amply demonstrate that, far from being oblivious to petitioners' contract rights, the court was perhaps overly zealous in trying to delineate the conflicting coverages and exclusions in both policies. It is this zealous effort which has given rise to petitioners' complaint now that pro rata contribution is improper since there was no common insured. Perhaps the District Court should have declared the exclusions of the two policies mutually repugnant, disregard them, and required pro rata contribution. Such would have been clearly allowable under the jurisprudence of this country.[5]

Obiter dictum in *Galloway v. Southern Farm Bureau Insurance Company*,[6] is used by petitioners as if it were the ultimate declaration of the law of South Carolina on contribution between insurers. The rule regarding contribution did not receive application in the *Galloway* decision. Truly, as decided in that case, the "excess" policies of Southern Farm, which afforded omnibus coverage to Wilkes, did not insure the same risk as the policy which was written by another company on

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[5]*Citizens Mut. Auto Ins. Co. v. Fireman's Fund Ins. Co.*, 234 F. Supp. 931 (W.D. Mich. 1964); *Truck Ins. Exch. v. Torres*, 193 Cal. App. 2d 483, 14 Cal. Rptr. 408 (1961); *Economy Fire & Cas. Co. v. Western States Mut. Ins. Co.*, 49 Ill. App. 2d 59, 198 N.E.2d 723 (1964); *Farmers Ins. Exch. v. Fidelity & Cas. Co.*, 374 P.2d 754 (Wyo. 1962); 7 Am. Jur. 2d, *Automobile Insurance* §202, at 545. See also, *Vance Trucking Co. v. Canal Ins. Co.*, 251 F. Supp. 93 (D.S.C. 1966), for cases cited therein.

[6]*supra*, note 1.

the Tolson vehicle. Perhaps the Supreme Court of South Carolina should have defined "risk," since we interpret that to mean the hazard that an insured vehicle may be operated in such a manner that an accident may occur and liability may be encountered.

There was co-insurance of the same risk in this case so far as Allstate and Canal were concerned. The right of contribution between insurers exists as "an equitable rule and is based on the fact that those who insure or become sureties for the same duty ought to share the results of the default."[7] The single *risk* insured against by both Allstate and Canal was that the vehicle being operated by the common servant of their insureds would be involved in an accident and expose their insureds to liability. Both policies of insurance covered the tractor-trailer unit here. "Risk," we submit, may be used as if synonymous with "accident," thus requiring contribution, within the meaning of the rule, because there was co-insurance of the same accident.

The District Court decision that there must be proportionate contribution to any loss was a considered one, was based upon the resolution of an impasse created by the conflicting exclusions of the insurance policies, and was clearly consonant with the law of the State of South Carolina.

II

If we understand the petitioners' treatment of their subsidiary question (our Question II), as this treatment is based upon their construction of *Travelers Insurance Company v. Allstate Insurance Company*,[8] their argument is thus:

Vance Trucking Company and Forrester Trucking Company are joint tort-feasors. Under the law of South Carolina, there may be no judicially enforced contribution between joint tortfeasors. Allstate is obligated to do no more and to pay no more than its insured would have to pay if insurance were not in issue. Neither Vance nor Forrester could compel contri-

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[7] *Lucas v. Garrett*, 209 S.C. 521, 527, 41 S.E.2d 212, 215 (1947); See also, *Cooper v. Georgia Cas. & Sur. Co.*, 244 S.C. 286, 136 S.E.2d 744 (1964).

[8] *supra*, note 2.

bution from the other if a plaintiff collected the total amount of a judgment from either. To require Allstate to pay more is to infringe upon its contractual rights.

On the basis of these assertions, whether explicit or implicit in their argument, the petitioners found their claim that the decision by the District Court, affirmed by the Fourth Circuit, impairs the obligations of the contract of insurance.

The petitioners are wrong on two counts. First, they err in assuming that Vance and Forrester are joint tort-feasors; they are not. Second, they err in assuming that the decision would amount to a constitutionally prohibited impairment of a contract; it would not. We will develop these theories in that order.

A. Joint Tort-Feasors.

In urging the relevance of the *Travelers* case, a 3-2 decision, petitioners imply that here, as in *Travelers*, we have a case involving joint tort-feasors. The cases are readily distinguishable.

In the *Travelers* case, the negligence or gross negligence of *three separate drivers*, operating *three separate vehicles*, caused injury to a guest passenger in one vehicle. There were truly three tort-feasors. Three separate individuals, each through negligence of his own and independent of the negligence of any other person, caused the plaintiff's injuries.

Here, there was only one tort-feasor, the negligent driver of the tractor-trailer unit. The District Court held, and Allstate no longer contests, that the driver was the agent and servant of both Vance and Forrester — two masters, one servant. The legal fiction created by the doctrine of *respondeat superior* does no more than make a master, or masters, responsible and answerable for a servant's delicts. That doctrine does not transform the master into the actual tort-feasor. If it did, the master would have to answer to criminal charges if the servant's fault in an accident also constituted a crime. If, as in the *Travelers* decision, we had two or more actual tort-feasors, there might be reason to consider petitioners' argument (if the Court could ignore that there was no reason for the rule in the *Travelers* case). In the absence of joint tort-feasors,

however, petitioners' argument is an experiment in syllogism. None of its premises is relevant.[9]

B. Impairment of Contracts.

Initially, we draw additional attention to a matter given only superficial treatment by petitioners, the issue whether the constitutional limitation even applies to the judiciary. This court has held that Article I, Section 8 of the United States Constitution is directed only to impairment by legislation, not to impairment by judgments of the courts.[10] Though the South Carolina Supreme Court set for itself a self-imposed limitation, that limitation was not required by Article I, Section 8 of the Constitution of South Carolina. Yet, petitioners use this self-imposed limitation to urge that, consonant with the *Erie* doctrine, the federal courts are bound or limited in like manner. If the federal courts were so bound, it would have to be because the South Carolina Constitution required it. It is not so required, and there is no cogent reason why this Court should follow a limitation which the South Carolina Supreme Court adopted without necessity.

Partially aside from and partially in keeping with the above consideration, we submit that, as a matter of historical development, there is no reason to impose Article I, Section 8 of either the South Carolina or the United States Constitution upon the courts. In delivering the opinion of the court in *Home Building & Loan Association v. Blaisdell*,[11] Chief Justice Hughes developed the history of Article I, Section 8 of the Federal Constitution. He pointed out that Article I, Section 8 had its origin in conditions prevalent after the Revolutionary War, conditions which saw the various states, through legislative schemes, defeat the payment of honest debts and infringe on the obligations of contracts.

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[9]By analogy, the situation here is not different from that where two individuals, each holding a policy of insurance, are joint owners of a truck and send the truck and a driver out on a mission during which an accident occurs. The only logical payment by the insurers for the joint owners-masters would be a prorated one.

[10]*Barrows v. Jackson*, 346 U.S. 249 (1953); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924).

[11]290 U.S. 398 (1934).

In comparison, since our courts only consider legal or equitable matters which either already exist or, in the case of declaratory actions, will exist between litigants, there is no reason to believe that judicial processes will lead to the conditions which prompted the enactment of Article I, Section 8. Our research has not disclosed a case in which this Court has held that some action by the judiciary has amounted to a violation of Article I, Section 8.

Finally, and even if the constitutional proscription were applicable to the courts, there was no impairment of the petitioners' contract by the decisions here. As stated heretofore, the District Court made a diligent effort to reconcile the conflicting insurance clauses in this case, even to the point that it became obvious that an unintended result would occur; the actual tort-feasor, the driver, would have no coverage because he was the servant of two masters. Many courts have refused to engage in the verbal gymnastics which are required to attempt a reconciliation of conflicting insurance clauses which first give then take away the very protection purchased. The District Court considered all those cases. Can if be said that the courts in those cases as well as the court here impaired the contracts of insurance involved? It cannot, not unless the courts are required to be fatuous when an ordinary man would not.

If considerations by this Court of Article I, Section 8, of the Federal Constitution might be used as comparative analogies to what should be said regarding the South Carolina Constitution, guidelines might be found in the following:

> The Constitution is "intended to preserve practical and substantial rights, not to maintain theories."[12]
>
> The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them . . .[13]
>
> For it is not every modification of a contractual promise that impairs the obligations of a contract

[12] *Faitoute Iron and Steel Co. v. City of Asbury Park, N.J.*, 316 U.S. 502, 514 (1942).

[13] *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 431 (1934).

under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause[14]

Our courts have always been able to amend, modify or abridge rights and remedies set up by contract or agreement; this is a major function of our judiciary. Shall the courts be held to a strict enforcement of contracts which are unconscionable, usurious, contrary to public policy?

The District Court, aside from its assiduous consideration of policy rights and obligations, appropriately balanced the equities of this case. There were two insurance coverages available, one, that of the petitioner, Allstate, much larger than the other. For a greater amount of premium, Allstate must assume a greater portion of the damages. This was the protection purchased.

CONCLUSION

The District Court and the Fourth Circuit Court of Appeals correctly applied the law applicable to this case. The decision does not abrogate any substantive rule of law declared by the South Carolina Supreme Court. It does not constitute a prohibited impairment of the obligations of a contract; it does not even fall within the purview of that constitutional safeguard. Certiorari should be denied.

Respectfully submitted,
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[14] *City of El Paso v. Simmons*, 379 U.S. 497, 506-507 (1965).